Supreme Court, U.S.
FILED

(1)

No. 981634 FEB 19 1999

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

FREDERICK CHARLES DANIELS,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Joanne Tyler Floyd
3214 East Market Street
York, Pennsylvania 17402
(717) 840-0980

Attorney for Petitioner

4DPP

QUESTIONS PRESENTED

1. Whether a witness should be barred from making an in-court identification in a criminal trial where that witness had been subjected to a prior suggestive identification process two months after the incident, the witness had given a prior conflicting description of the suspect and where there was a two year lapse between the incident and the in-court identification by the witness?

2. Whether oral inculpatory statements of a defendant taken during custodial interrogation, and without the assistance of counsel, which were not preceded by ***Miranda*** warnings, can be entered into evidence over specific objection of counsel?

3. Whether a defendant is denied due process of law in the prosecution of a narcotics case where there was a delay of two years and six months between the alleged transaction and the defendant's arrest, and where the government's case consisted mainly of a policewoman's testimony that she had purchased narcotics from the defendant?

PARTIES/INTRODUCTION

The Petitioner, Frederick Charles Daniels, was the defendant in the trial Court and was the appellant in the Pennsylvania Superior Court. The Respondent, the Commonwealth of Pennsylvania was the Plaintiff / Appellee.

The reference "T.R." will refer to the trial record notes of testimony. The Reference "Supp R." will refer to the notes of testimony transcribed from the hearing on the Petitioner's motion to suppress physical evidence.

TABLE OF CONTENTS

	Page
Questions Presented	*i*
Parties/Introduction	*ii*
Table of Contents	*iii*
Table of Authorities.	*iii*
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
A. Proceedings Below	2
B. Statement of the Facts	4
Reasons for Granting the Writ	6
Conclusion	13

TABLE OF AUTHORITIES

Cases Cited

Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 22 2243, 531 L.Ed.2d 140 (1977 . . . . . 8, 9, 10

Contents

Page

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966) . . . . . i, 3, 6, 11, 12

Niel v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) 8, 10

Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) 6, 7, 8

Tynan v. United States, 126 U.S. App. D.C. 206, 208, 376 F.2d 761, 763 (1967) 7

United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971) 6

United States v. Wade, 388 U.S. 218, 241, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149 (1967) . . 9

Statutes Cited:

28 U.S.C. Section 1257 (a) 1

U.S.C.A Amendments V, VI, XIV 1, 2

APPENDIX

Appendix A --- Opinion of the Adams County, Pennsylvania Court of Common Pleas dated May 15, 1997 . . . . . 1a

Contents

	Page
Appendix B --- Opinion of the Pennsylvania Superior Court Dated July 15, 1998	7a
Appendix C --- Order of the Pennsylvania Supreme Court Dated July 15, 1998	21a

OPINIONS BELOW

The opinion of the Adams County, Pennsylvania Court of Common Pleas is unreported. The opinion is attached hereto and marked Appendix A.

The opinion of the Pennsylvania Superior Court is unreported. The opinion is attached hereto and marked as Appendix B.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court entered its judgment on November 24, 1998. (See Appendix C attached hereto.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

A. U.S.C.A. Const. Amend V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. U.S.C.A. Const. Amend VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

C. U.S.C.A. Const. Amend XIV, Sec. 1

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On November 10, 1994, a John Doe complaint was filed in Adams County, Pennsylvania alleging that on October 13, 1994, an individual had sold two packets of cocaine to an

undercover police officer in Hamilton's Tavern, Gettysburg, Pennsylvania.

On April 28, 1995, Petitioner was arrested pursuant to the above complaint. He was charged with one count of delivery of a controlled substance. A preliminary hearing took place on May 22, 1995. On that day the Commonwealth withdrew the complaint because its witnesses failed to appear. The complaint was re-filed on May 24, 1995.

Petitioner was re-arrested on July 3, 1996. A preliminary hearing was conducted on August 19, 1996. The matter was bound over for trial.

Trial counsel timely filed an Omnibus Motion for Pretrial Relief. On December 27, 1996, a hearing was held in the trial court on Petitioner's motion to dismiss for violation of his right to a speedy trial. A motion to suppress in-court and out of court identifications by the investigating officer was also argued. The motions were denied.

On January 13, 1997, trial counsel moved *in limine* to exclude certain statements made by Petitioner during his transportation to prison and certain physical items seized. The motion was denied in part and granted in part. On January 16, 1997, counsel moved to suppress Petitioner's aforementioned statements as a violation of ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602 16 L.Ed. 694 (1966) . The motion was denied.

On January 16, 1997, Petitioner was found guilty of the charge after a jury trial. He was sentenced on February 29, 1997, to a term of 22 to 48 months incarceration. A motion to reconsider sentence was filed by appellate counsel on March 5,

1997. The motion was denied after a hearing on April 15, 1997.

An appeal to the Pennsylvania Superior Court was filed on May 8, 1997. The Pennsylvania Superior Court entered an order on July 15, 1998, affirming the lower Court's judgment. A Petition for Allocatur was filed in the Pennsylvania Supreme Court. The Pennsylvania Supreme Court entered an order on November 24, 1998, denying the Petition. This Petition followed.

B. STATEMENT OF THE FACTS

On October 13, 1994, at approximately 9:20 p.m., Pennsylvania State Trooper Gina Tasselmyer and confidential informant Teresa Spangler entered Hamilton's Tavern in Gettysburg, Pennsylvania. T.R. 38, 39. They were working undercover in a drug investigation T.R. 37 The bar was moderately lit. T.R. 16, 52, 155

Trooper Tasselmyer and the informant walked over to the bar area. They stood there approximately one minute when a male approached. T.R. 49 The male asked the informant if she needed anything. T.R. 40 They agreed upon a $40.00 sale of crack cocaine. The three moved to a table away from the bar. T.R. 49 This area of the bar is darker than the bar area. T.R. 155, 159, 163. The male handed two packets to the informant, who handed him $40.00 T.R. 82 The transaction lasted approximately thirty seconds. Supp. R. 20, Vol.2 After a brief conversation, the trooper and the informant left the building. The encounter with the male took ten to fifteen minutes. T.R. 83

Trooper Tasselmyer prepared a written report on the evening of the incident. On the report she described the suspect as being a white male, of thin build, in his 50's, with brown eyes and gray hair. T.R. 54 She subsequently changed the suspect's description. The new description indicated that the suspect was a black male, of medium build, in his 30's with brown eyes and black hair worn in a buzz cut. T.R 59

One month later, on November 10, 1994, Pennsylvania Trooper Kenneth Hassinger filed a John Doe warrant charging the unnamed male with one count of drug delivery. Trooper Hassinger went to Hamilton's Bar on November 17, 1994. T.R. 114 He observed Petitioner, a black male in his 40's T.R. 115, 149 The trooper removed Petitioner from the bar and took pictures of him. T.R. 115, 116, 117 Petitioner was questioned about his name and released. T.R. 116

Two months after the sale took place, Trooper Hassinger showed the above-specified photographs to Trooper Tasselmyer. No other photographs were shown to the trooper at that time. T.R. 117 The trooper positively identified Petitioner as being the male who had sold her the two packets of cocaine two months before. Two and one-half years later, she testified during Petitioner's trial and identified him as being the male who had sold her the drugs. Supp. R. 10, Vol.2

Petitioner was arrested on April 29, 1995, nearly seven (7) months after the sale. He was photographed and fingerprinted. Supp. R. 36, Vol. 3. He immediately made bail. Supp. R. 37, Vol. 3 He appeared in court with counsel on May 22, 1995. A preliminary hearing was commenced. T.R. 124, 125 Neither Trooper Tasselmyer nor the informant appeared. T.R. 125 Trooper Hassinger withdrew the charge on that date. T.R. 125 He re-filed the complaint on May 24, 1995. T.R. 125

On June 6, 1995, Trooper Hassinger received Petitioner's fingerprint information. The information indicated that Petitioner used a name other than the one listed in the re-filed complaint. Supp. R. 38 Vol. 3. The Trooper placed this name into N.C.I.C. on June 9, 1995, and contacted Petitioner's counsel to ascertain his whereabouts. Supp. R. 39, Vol.3. On September 6, 1995, a fugitive warrant was issued for Petitioner. Supp. R. 13, Vol.3. Petitioner was arrested in Florida on the fugitive warrant on July 3, 1996. On July 16, 1996, he was transported to Adams County Prison. Supp. R. 14, Vol. 3

While being transported from prison to his arraignment, Petitioner was questioned by Trooper Hassinger. Petitioner made statements to Trooper Hassinger. He had not been advised of his ***Miranda*** warnings. Supp. R. 8, 10, 11, Vol. 3

Petitioner was convicted of the charge after a jury trial. An appeal to the Pennsylvania Superior Court was timely filed. The Superior Court affirmed the conviction on July 15, 1998. The Pennsylvania Supreme Court denied his Petition for Allocatur on November 24, 1998. This Petition followed.

REASONS FOR GRANTING THE WRIT

1. The Pennsylvania Superior Court has too narrowly construed the principles established in ***United States v. Marion***, 404 U.S. 307, 92 S. Ct. 455 (1971) and ***Ross v. United States*** , 349 F.2d 210 (D.C. Cir. 1965) Both ***Marion, supra***, and ***Ross, supra***, recognized that a significant delay between an alleged criminal incident and the arrest of the accused may constitute a denial of due process of law as required by the Fifth Amendment. An accused has been denied

due process if the delay is intentionally caused by the State and the accused has suffered prejudice due to the delay. In this case, it is uncontroverted that the State intentionally delayed arresting Petitioner for a period of seven months after the incident. Because of this passage of time, Petitioner was put at a great disadvantage in trying to account for his whereabouts on the date in question. His disadvantage was severely increased when the State withdrew the charges after his first preliminary hearing and then re-arrested him a year later. The lower Courts ignored the initial pre arrest delay and instead focused on Petitioner's behavior prior to his second arrest. The courts reasoned that it had determined in a prior ruling that a six year delay between arrest and crime was not a denial of due process in a homicide case. In so doing, the lower Courts failed to address the unique features of a narcotics case and why the passage of time in these cases is far more critical. The ***Ross*** Court specifically addressed this concern in its decision. That ***Ross*** mandates that Courts more strictly scrutinize these claims in drug cases is clear by the holding of ***Tynan v. United States*** , 126 U.S. App. D.C. 206, 208, 376 F.2d 761, 763 (1967):

> We recognize, however, that there are real and substantial differences between the problems of proof in the defense of a narcotics prosecution and those involved in defending against a mail fraud indictment and that these differences are inherently and vitally related to the possibility of prejudice resulting from delay in prosecution. The narcotics prosecutions which have caused our concern in ***Ross v. U.S.***, ***supra***, and the dozen or so later opinions, rely fundamentally upon an identification of a

> defendant as a result of a single brief contact by a Government witness who, in a relatively short period of time, has participated in a substantial number of virtually identical transactions. Id at 762

This case is virtually identical to the ***Ross*** case. In both cases, there was a brief encounter between the undercover agent and the suspect. In both cases, there was a seven month delay between the incident and the arrest in order to protect an ongoing investigation. In both cases, the defendants were denied due process of law. Yet the Pennsylvania Superior Court would not apply the ***Ross*** holding to these facts.

We are mindful that ***Ross*** and its progeny came out of the supervisory jurisdiction of the Washington, D.C. Courts. However, the concerns addressed in the Washington D.C. jurisdiction are now evident across the country. A defendant in Pennsylvania should have his Constitutional rights protected to the same extent as a defendant in Washington, D.C. We are merely seeking uniform treatment. For this reason, we believe the Writ should issue.

2. The Pennsylvania Superior Court's decision that the undercover policewoman's out of court and in-court identifications of Petitioner were admissible conflicts with this Court's holding in ***Manson v. Brathwaite*** , 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) and ***Niel v. Biggers*** , 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972) Under ***Biggers*** and ***Manson*** , if a witness has been subjected to an unnecessarily suggestive identification procedure, he or she will not be allowed to make an in court identification of a suspect unless they have an independent basis for making the identification. The factors the Court must consider in

determining whether the witness does have an independent basis are the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. See also ***United States v. Wade*** , 388 U.S. 218, 241, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149 (1967).

In this case, the undercover officer was shown two photographs of Petitioner two months after the incident. Trial counsel sought to suppress this suggestive identification procedure. The Court denied the suppression motion and ruled that this out of court identification was admissible. This ruling is in direct contradiction with the language of ***Manson***, ***supra***, which sets forth the factors a Court must consider before determining whether a one on one confrontation is unduly suggestive. One of the most critical factors a Court must consider is the passage of time between the incident and the one on one identification. In ***Manson***, ***supra***, this Court found that the viewing of a single photograph by the undercover officer was not inadmissible because it took place within two days of the incident. The Court further stated that:

> We do not have here the passage of weeks or months between the crime and the viewing of the photograph. Id at 2254

Unlike the situation in ***Manson***, we do have "the passage of weeks or months between the crime and the viewing of the photograph." The viewing was suggestive, contrary to the lower Court's rulings.

In addition to ruling that the suggestive out of court identification was admissible, the Court improperly permitted the same undercover officer to make an in-court identification of Petitioner although the record showed that she did not have an independent basis for making an identification in court. Again, the lower Court did consider the factors outlined in ***Manson*** and ***Biggers***, but misapplied those factors to the facts. In particular, the Court gave little significance to the fact that the in court identification took place more than two years after the incident, and after the aforementioned suggestive confrontation. The Court ignored the witness' prior conflicting description of the suspect and the brevity of the encounter.

In reviewing the totality of the circumstances, one cannot rule out the very real chance that a misidentification took place in this case. This was a very brief encounter that took place in a dark bar. This transaction was not the only transaction that this officer was involved in on the night in question. One must question the officer's degree of attention paid during this transaction. By her own admission, she had originally described the suspect as a white male in his fifties, of thin build, with gray hair. She later changed the description to a black male in his thirties of medium build, with a buzz haircut. Not only was this description totally inconsistent with her previous description, but is also inconsistent with Petitioner who is a black male in his forties. To further compound the chances of misidentification, the officer viewed suggestive photographs consisting solely of Petitioner. Finally, after a passage of two years, the officer is permitted to identify Petitioner in Court, where, once again, he is the only suspect being shown to the witness. At each turn, who else could this officer identify but Petitioner who was consistently the only person ever shown to the officer for identification?

By allowing the admission of this tainted and unreliable evidence in Petitioner's trial, the lower Court denied Petitioner his Fifth and Fourteenth Amendment rights to due process of law. How can it be said that Petitioner received a fair trial under these circumstances?

Petitioner therefore believes this Petition should be granted to review the Pennsylvania Superior Court's treatment of his Constitutional right to a fair trial.

3. The Pennsylvania Superior Court has erroneously applied this Court's opinion in ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966). In ***Miranda***, the United States Supreme Court held that any custodial interrogation of suspects by law enforcement officers must be preceded by an explanation of their Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Any statements made by suspects during custodial interrogation are inadmissible if ***Miranda*** warnings are not given.

After Petitioner was arrested in 1996, he was transported by State Trooper Hassinger from the county jail to court to be arraigned. During the ride, Trooper Hassinger engaged Petitioner in conversation. The conversation evolved into a question and answer session. The Trooper did not give Petitioner his ***Miranda*** warnings. During this session, Petitioner, made incriminating statements which were admitted against him at trial. The lower Court ruled that ***Miranda*** warnings were not necessary in this situation because Petitioner was not being subjected to custodial interrogation. The Court ruled this despite the Trooper's characterization of the conversation as follows:

> A: He'd ask a question. I would answer it or vice versa. I mean there was no what I would call an interview. T.R. 10,11

Despite the Trooper's opinion that the above does not constitute interrogation, it strains the imagination to characterize a question and answer session as anything else but an interview. ***Miranda*** warnings should have been given to Petitioner prior to this custodial interrogation. Petitioner asserts that the Court's refusal to recognize this exchange as a custodial interrogation constituted an erroneous application of ***Miranda***.

CONCLUSION

For the reasons stated above, petitioner respectfully asks that a Writ of Certiorari issue to review the judgment of the Pennsylvania Superior Court.

Respectfully submitted,

Joanne Tyler Floyd, Esquire
3214 East Market Street
York, Pennsylvania 17402
(717) 840-0980

Attorney for Petitioner

APPENDIX

APENDIX A — OPINION OF THE ADAMS COUNTY, PENNSYLVANIA COURT OF COMMON PLEAS DATED MAY 15, 1997

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA : No.CC-601-96
:
v. :
:
FREDERICK CHARLES DANIELS :
Defendant :

STATEMENT PURSUANT TO PA.R.APP.P. 1925

On October 13, 1994, Gina Tasselmyer, a trooper with the Pennsylvania State Police was working in an undercover capacity at a location in Gettysburg known as Hamilton's Tavern. While doing so, she purchased a quantity of cocaine from a black male she only knew as Rob. Although the actual transaction took only about 30 seconds, the trooper was in the seller's presence around twenty minutes, had a good opportunity to observe him, paid close attention to detail and made notes shortly after the incident. They first met at the bar, then went to a table to transact business. During this time, defendant was within an arm's length of the trooper. The establishment's interior was moderately lighted and no physical or mental condition affected the trooper's ability to observe. Except for some minor discrepancies, such as entering W (for white) and substituting B (for black), which were immediately corrected on her report, Tasselmyer's written description was consistent with defendant's appearance.

Appendix A

The trooper did not file charges immediately because of an ongoing drug investigation. She saw defendant at least twice between the incident and December 16, 1994. The two exchanged pleasantries, with defendant asking Tasselmyer if she remembered him (she said yes) and if she needed anything (she said no). When charges were filed on November 10, 1994, defendant was identified as John Doe, a/k/a/ Rob. Sometime between November 15, 1994 and December 16, 1994, Trooper Kenneth Hassinger, the prosecutor, and at least other police officer, entered Hamilton's Tavern, took defendant outside and photographed him. This procedure was certainly unusual, even irregular, but related only to the means by which two photographs were obtained. We were not asked to suppress the photographs, nor were they used at trial. The photography session had nothing to do with Tasselmyer's identification. When shown the pictures, on December 16, 1994, the trooper immediately identified defendant as the seller. Police then used the name *Dennis Childes*, one of defendant's several aliases. Subsequent to arrest in April, 1995, the police obtained information which led them to believe defendant's name was Carl Johnson. Defendant signed a bail piece using that name on April 28, 1995.

Defendant appeared with counsel, Barbara Entwistle, Esq., at his preliminary hearing on May 22, 1995. Commonwealth withdrew the charges because of evidentiary problems, then refiled on May 24, 1995. Thereafter, police were unable to locate defendant and a warrant was issued June 5, 1995. On June 9, 1995, three aliases were entered in NCIC. The police asked Ms. Entwistle if she knew the whereabouts of her client, sent fugitive notices, and inquired at a residence at which defendant was believed to stay (Ms. Margaret Smith) without

success. Defendant was finally apprehended in Florida on July 16, 1996.

Defendant waived formal arraignment on September 13, 1996, entered a plea of not guilty, and requested a jury trial. On October 28, 1996, defense counsel was granted an extension of time in which to file an omnibus pre-trial motion. After several continuances, this application was finally heard December 27, 1996. Two requests were made: 1) suppression of Tasselmyer's identification because of the suggestiveness of the photographic identification on December 16, 1994; 2) Dismissal under Pa. R.Crim.P. 1100.

The undercover officer was shown only one person's photograph. Assuming that this was suggestive, any identification resulting from that view should have been suppressed unless the Commonwealth demonstrated, by clear and convincing evidence, that subsequent identifications were based on an independent source. We found it did.

All one-on-one confrontations are not per se suggestive, ***Commonwealth v. Toro***, 432 Pa. Super 383, 638 A.2d 991 (1994), nor did we find it to be the case sub judice. Although the time span between the crime and confrontation is generally the critical factor, we think other circumstances may be considered. Tasselmyer was familiar with police procedure and could hardly be said to have been influenced by fellow officers. She gave a description of a man who frequented Hamilton's Tavern and other policemen went to that location to photograph someone meeting her description. She adamantly maintained that her positive and unwavering identifications resulted solely from observations prior to having been shown the photographs. In its denial of the motion to suppress,

entered December 27, 1996, this court accepted her testimony and found, based upon a totality of evidence, an independent basis for the identification. The conclusion was based upon a clear and convincing standard.

This judge, without intending to recite an exhaustive list, listed four considerations. However, time was a definite consideration and all five factors described in appellate decisions were considered. These included: 1), Tasselmyer's opportunity to view defendant at the scene of the crime and on at least two occasions thereafter; 2) her degree of attention; 3) the accuracy of her prior description; 4) the level of certainty of her identification at the hearing and earlier confrontations, and; 5) the length of time between the crime and confrontation. ***Commonwealth v. Abdul-Sallam***, 544 Pa. 514, 678 A.2d 342 (1996).

The fifth presents some mild problems, but we found the witness to be candid and truthful., It should be kept in mind that she is trained and made a conscious effort to be observant in order to accurately remember and identify the drug dealer who transferred cocaine. We had no hesitancy in accepting her testimony.

A Rule 1100 motion was also rejected. Trooper Hassinger testified that defendant used six different aliases with a corresponding number of different birth dates. We have already described the efforts made to discover defendant's whereabouts.

There was no suggestion that the first prosecution was dismissed to circumvent the rule. Thus the period considered began with the filing of the second complaint. ***Commonwealth***

v. Schafer, 394 Pa. Super. 493, 576 A.2d 392 (1990); alloc. den. 527 Pa. 644, 593 A.2d 417 (1991). The circumstances compare with those in ***Commonwealth v. Fisher***, 545 Pa. 233, 681 A.2d 130 (1996). Actually, a much longer delay was rejected as a reason for dismissal by our highest court in that case (8 years).

Defendant, not the Commonwealth, was accountable for the delay occasioned by his aliases and flight. Excludable time ran to the earliest possible trial date. ***Commonwealth v. Wentzel***, 434 Pa. Super. 76, 641 A.2d 1207 (1994), alloc. den. 539 Pa. 667, 652 A.2d 838 (1994).

On January 3, 1997, Defendant filed a motion in limine seeking to exclude from evidence a scanner, wooden handle and ID with a different name which had been seized by the police at the time of arrest. Defendant further sought to exclude "that Defendant slandered him (Trooper Hassinger) racially and professionally, said that the charge could not hurt him, that he (Defendant) has spent lengthy time in jail, that the police could not successfully prosecute him, and acknowledged using an assume (sic) name at one point in the prosecution."

The order entered January 13, 1997, refused the motion as to possession by defendant of an ID card with a different name at the time of his arrest (Defendant's picture was on the identification card), statements that a $40 rock would not hurt defendant and that defendant had not given a correct name. This evidence was held to be relevant to show consciousness of guilt.

Appendix A

Evidence of aliases, especially coupled with flight, are admissible to show consciousness of guilt. ***Commonwealth v. Toro***, supra.

A jury found defendant guilty January 16, 1997. A pre-sentence investigation was ordered and sentencing deferred until February 24, 1997. Defendant was ordered to undergo imprisonment in a state correctional institution for not less than 22 months, nor more than 48 months.

After Sentencing, defendant changed counsel and moved to modify sentence. The motion was considered and denied April 15, 1997. The sole grounds presented was that the court relied upon stale convictions in computing defendant's prior record score. We found this lacking in merit. Neither the Sentencing Code nor guidelines place time limits on prior convictions. ***Commonwealth v. Johnson***, 421 Pa. Super 433, 618 A.2d 421 (1992)

BY THE COURT,

"s/ Oscar F. Spicer" .
President Judge

May 15, 1997

Appendix B

APENDIX B — OPINION OF THE PENNSYLVANIA SUPERIOR COURT DATED JULY 15, 1998

J.A.04026/98

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
V.	:	
FREDERICK CHARLES DANIELS	:	
Appellant	:	No. 471 Harrisburg 1977

Appeal from the Judgment of Sentence entered February 24, 1997, in the Court of Common Pleas of Adams County, Criminal No CC-601-96

JUDGMENT

***ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* Adams *County be, and the same is hereby* Affirmed.**

BY THE COURT:

"s/ David A. Szewczak"
PROTHONOTARY

Dated: July 15, 1998

Appendix B

J. A.04026/98

COMMONWEALTH OF PENNSYLVANIA,	: IN THE SUPERIOR COURT : OF PENNSYLVANIA
Appellee	:
V.	:
FREDERICK CHARLES DANIELS	:
Appellant	: No. 471 Harrisburg 1977

Appeal from the Judgment of Sentence entered February 24, 1997, in the Court of Common Pleas of Adams County, Criminal No CC-601-96

BEFORE: CAVANAUGH, EAKIN AND STEVENS, JJ.

MEMORANDUM: **F I L E D** JUL 15 1998

Frederick Charles Daniels appeals the February 24, 1997 judgment of sentence following his conviction for possession with intent to deliver cocaine.[1]

On October 13, 1994, trooper Gina Tasselmyer and a confidential informant entered Hamilton's Bar in Gettysburg, where they were approached by appellant, who said his name was Rob. Appellant shortly sold the undercover trooper .17 grams of cocaine. After leaving the bar, Trooper Tasselmyer met with Trooper Kenneth Hassinger to record the incident, including a description of appellant.

---

[1] 35 Pa. C.S. Sec. 780-113(a)(30).

Appendix B

On November 10, 1994, Trooper Hassinger filed charges against "John Doe", indicating the suspect used the alias "Rob." When the Trooper approached appellant to execute the warrant, appellant said his name was "Carl Johnson." Having only a written description, Trooper Hassinger decided not to execute the warrant. Trooper Hassinger took a photograph of appellant and showed it to Trooper Tasselmyer, who identified appellant as the man who sold her cocaine. On April 29, 1995, Trooper Hassinger arrested appellant; whose identification showed his name was "Dennis Childs." Subsequently appellant signed a bail piece using the name "Carl Johnson."

On May 22, 1995, the Commonwealth withdrew the charges when witnesses did not appear for the preliminary hearing. Two days later, charges were refiled but appellant could not be located. A warrant for his arrest was issued June 5, 1995. On June 6, 1995, Trooper Hassinger received appellant's fingerprint report identifying him as Frederick Charles Daniels; "Carl Johnson," the name on the bail piece and complaint was merely another alias. On June 9, 1995, Trooper Hassinger put appellant's proper name into NCIC and contacted his counsel to ascertain his whereabouts. Appellant was eventually apprehended in Florida on July 3, 1996, and extradited to Pennsylvania.

On October 29, 1996, appellant was granted an extension of time to file an omnibus pre-trial motion. After several continuances, appellant's motion to dismiss pursuant to Pa.R. Crim.P. 1100, and his motion for suppression were denied December 27, 1996. A motion *in limine* to exclude certain statements made by appellant was granted in part and denied in part. On January 16, 1997, a jury convicted appellant, and on

February 24, 1997, he was sentenced to a term of 22 to 48 months incarceration. A motion to reconsider sentence was denied, and this timely appeal was filed, wherein appellant raises these issues:

I. Whether the trial court erred in denying appellant's motion to dismiss under Rule 1100 of the Pennsylvania Rules of Criminal Procedure;

II. Whether the trial court erred in denying appellant's motion to suppress statements made in violation of ***Miranda v. Arizona***;

III. Whether the trial court erred in permitting Trooper Tasselmyer to make an in-court identification.

IV. Whether trial counsel was ineffective for failing to move for dismissal on the ground that the pre-arrest delay between the incident and the arrest denied appellant due process of law;

V. Whether trial counsel was ineffective for not permitting appellant to exercise his right to testify;

VI. Whether trial counsel was ineffective for failing to object to leading questions asked by the prosecutor throughout trial;

VII. Whether trial counsel was ineffective for

cross-examining Trooper Tasselmyer on a prior out of court photo identification which was suggestive and not introduced into evidence by the Commonwealth;

VIII. Whether trial counsel was ineffective for failing to request a point for charge advising jurors to receive the testimony of paid government informants with caution; and

IX. Whether the sentence imposed was excessive.

When reviewing the motion under Pa.R. Crim.P. 1100, we must determine whether the trial court abused its discretion in determining the Commonwealth acted with due diligence in bringing the appellant to trial. ***Commonwealth v. Peer***, 454 Pa. Super. 109, 117 684 A.2d 1077, 1081 (1996). "Due diligence is a fact-specific concept that is determined on a case-by-case basis." ***Id.*** (citations omitted).

The Commonwealth has 365 days form the filing of the criminal complaint to bring a defendant to trial. Pa.R. Crim. 1100(a)(3). Appellant contends the Commonwealth violated this Rule, as the complaint of November 10, 1994, was filed over two years before trial, January 16, 1997. Appellant concedes a second complaint was filed May 24, 1995, but asserts the Commonwealth withdrew charges and refiled merely to circumvent the Rule.

Careful review of the record reveals no evidence the prosecution attempted to evade Rule 1100. ***See Commonwealth v. Schafer***, 394 Pa. Super. 493, 499-500, 576 A.2d 392, 395 (1990) (citations omitted) ("where the record

does not show that the Commonwealth's termination of the prosecution was designed to manipulate or evade the requirements of Rule 1100, the time for computing the speedy trial period runs from the date of the later complaint"). The prosecution withdrew the charges when its witnesses failed to appear for the May 22, 1995 preliminary hearing; dismissal had nothing to do with avoiding Rule 1100. The charges were refiled two days later. The trial court correctly calculated the 365 day period from the filing of the second complaint.

To determine whether the court's calculation was proper, we first look to Rule 1100, which provides in part as follows:

> (c) In determining the period for commencement of trial, there shall be excluded therefrom: . . . (3) such period of delay at any stage of the proceedings as results from: (i) *the unavailability of the defendant* . . . (ii) *any continuance granted at the request of the defendant or the defendant's attorney.*

Pa.R.Crim.P. 1100(c) (3)(i) (emphasis added). While appellant argues the Commonwealth must show it exercised due diligence, this requirement "does not demand perfect vigilance and punctilious care, but rather a reasonable effort." ***Commonwealth v. Fisher***, 545 Pa. Super. 233, 245, 681 A.2d 130, 136 (1996) ***quoting Commonwealth v. Polsky***, 493 Pa. 402, 407, 426 A.2d 610, 613 (1981). Delay attributed to appellant's absence form the Commonwealth is excludable. Given his flight to Florida, the numerous aliases and dates of birth undeniably given to fool police about his identity, appellant is hard pressed to complain - if anything he was too successful in avoiding capture. Under these circumstances, the efforts of the Commonwealth were reasonably designed to

locate and try appellant. Appellant's request for additional continuances negate allegations of subsequent prejudice, and the trial court did not abuse its discretion in denying appellant's Rule 1100 motion.

Next, the appellant asserts error in denial of his motion to suppress statements made to Trooper Hassinger on route to the prison after arraignment. Appellant contends these were the product of custodial interrogation, and therefore inadmissible for want of the constitutional warnings mandated by ***Miranda v. Arizona***, 384 U.S. 436 (1996). A suppression hearing held January 16, 1997 revealed ***Miranda*** warnings were not warranted since appellant was not undergoing custodial interrogation.[2] While the trooper testified he and appellant were talking back and forth, he was not interviewing the appellant.[3] Custodial interrogation requires questioning,

---

[2] At the suppression hearing prior to trial, Trooper Hassinger testified:

Q: What did he say?

A: He called me - from the back seat he said I was a punk ass white racist cop and that a 40 dollar rock was not going to hurt him. He then stated he had been in jail longer than I was old and I could not hurt him.

Q: Was that in response to any question by you?

A: No, I never asked him a question for that response.

Trial transcript, 1/16/97 at 10.

[3]On cross-examination:

Q: Was there any conversation that you initiated prior to that statement made by Mr. Daniels?

words, or actions on the part of officers which they should have known are reasonable likely to elicit incrimination statements. ***Commonwealth v. Abdul-Salaam***, 544 Pa. 514, 532, 678 A.2d 342, 351 (1996) (citations omitted). The mere fact appellant is in custody does not require ***Miranda*** warnings. ***See Commonwealth v. Avondet***, 439 Pa. Super. 421, 426, 654 A.2d 587, 590 (1995), ***alloc. denied***, 541 Pa. 631, 663 A.2d 684 (defendant blurted out an inculpatory statement while in police custody; the statement was held not subject to suppression or ***Miranda***).

Appellant's statement was clearly spontaneous, not the product of an attempt to elicit a response. If the remark in question had been made by the Trooper instead of the appellant, it would easily be termed unprovoked and unwarranted; to say this was the answer to a question or response to provocative conduct stretches our imagination as to what the question or conduct could possibly have been. There clearly is no such activity shown in the record, and the trial court did not abuse its discretion by denying appellant's suppression motion.

Appellant also contends the trial court erred by permitting Trooper Tasselmyer to make an in-court identification, because

---

A: He was talking back and forth from the back seat. I wasn't talking to him in terms of interviewing him, no.

Q: But you were talking with Mr. Daniels?

A: He'd asked a question. I would answer it or vice versa. I mean there was no what I would call an interview.

Trial Transcript, 1/16/97 at 10-11.

of the suggestive individual showing of appellant's photograph, and the period of time between the crime and the in-court identification. According to appellant, the Commonwealth failed to establish an independent basis for Trooper Tassselmyer's identification.

In order to determine whether an in-court identification is reliable, we must look at the totality of the circumstances. ***Fisher***, at 257, 681 A2d at 141-42 (1996). The factors to be evaluated include:

. . . (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; (5) and the time between the crime and the confrontation.

Commonwealth v. Carter, 537 Pa. 233, 253, 643 A.2d 61, 71 (1994), ***cert. denied***, 514 U.S. 1005 (1995). Our review is limited to a determination of whether sufficient evidence supports an independent basis for the identification. ***Id.***

There is evidence Trooper Tasselmyer had an independent basis for her in-court identification, sufficient to purge the taint of any suggestive pre-trial identification. She had ample opportunity to observe the appellant during the transaction at Hamilton's Bar. While the transaction lasted only thirty seconds, the trooper spent fifteen to twenty minutes talking to appellant at arm's length, giving her sufficient opportunity to view and identify him. The trooper also wrote an accurate description of appellant in her notes immediately following the crime. At trial, the trooper testified there was no doubt in her

mind appellant was the individual who sold her the controlled substance on October 13, 1994.

Due to circumstances beyond the trooper's control, a lengthy time period existed between the time of the crime and the trial, but this alone is not dispositive; rather, it is the totality of the circumstances which must be examined. ***Fisher, supra.*** We agree with the trial court's determination Trooper Tasselmyer's identification was a result of what she saw on the night of the drug sale, not the improper showing of the photograph by Trooper Hassinger.

Appellant next argues five claims of trial counsel ineffectiveness: (1) failing to move to dismiss on the ground of delay between the incident and arrest, (2) preventing appellant from testifying, (3) failing to object to leading questions by the prosecutor, (4) cross-examining Trooper Tasselmyer on a suggestive photo identification, and (5) failing to request a point of charge advising jurors to receive the testimony of paid government informants with caution.

To succeed with a claim of ineffective assistance of counsel, appellant must demonstrate the underlying claim has arguable merit, counsel's action or inaction was not grounded on any reasonable basis designed to effectuate appellant's interest, and, but for the act or omission in question, the outcome of the proceedings would have been different. ***Commonwealth v. Travaglia***, 541 Pa. 108, 661 A.2d 352 (1995), cert. denied, 516 U.S. 1121 (1995). Counsel is never ineffective for failing to raise a meritless claim. ***Id.***, at 120-21, 661 A.2d at 358. When the certified record is sufficient to permit review of ineffectiveness claims raised for the first time on direct appeal, we need not remand for an evidentiary

hearing. ***Commonwealth v. Pearson***, 454 Pa Super. 313, 328, 685 A.2d 551, 558 (1996) (***en banc***), ***alloc. denied***, 549 Pa 699, 700 A.2d 439 (1997).

Appellant first challenges counsel for failing to move to dismiss on the ground the delay between the incident and arrest denied him due process of law. The pre-arrest delay, approximately one year and eight months from the filing of the second complaint, and nearly two years and six months following the criminal activity, is fairly substantial. However, there is no evidence to suggest the delay was created by the Commonwealth to manipulate or evade the requirements of Rule 1100 or the constitution. Much of the delay must lie at the feet of appellant, who at every turn gave false information, then fled the state. Further, appellant has failed to demonstrate any prejudice resulting from the delay. See ***Commonwealth v. Grazier***, 391 Pa Super. 202, 208, 570 A. 1054 (1990) (pre-arrest delay of six years and nine months following date of homicide did not violate due process and counsel was therefore not ineffective for failing to quash the information on that ground). If anything, the delay gave him ammunition with which to attack the identification.

Appellant's second and third allegations condemn counsel for failing to permit him to testify, and failing to object to leading questions by the prosecution. He does not offer any reasons why these tactical decisions were unreasonable; he merely asserts the belief he was prevented from testifying by counsel and that counsel failed to object to leading questions. Appellant also fails to demonstrate how his testimony or counsel's objections would have likely changed the verdict. As such, his ineffectiveness claim must fail. See ***Commonwealth v. Preston***, 418 Pa Super. 125, 129-30, 613 A.2d 603, 605

(1992) (when alleging ineffectiveness for counsel's failure to call him to the stand, appellant must demonstrate counsel interfered with his right to testify or gave such unreasonable advice as to vitiate a knowing and intelligent decision by the client; appellant must demonstrate more than a claim of strategic error, he must show specific incidents of counsel's impropriety); ***Commonwealth v. May***, 296 Pa. Super. 435, 439-40, 442 A.2d 1129, 1132 (1982) (failure to object to leading questions is not prejudicial when they merely recapitulate or repeat facts).

Equally unavailing is appellant's challenge to counsel's cross-examination of Trooper Tasselmyer about an out of court photo identification.[4] As a general rule, trial strategy is left to the determination of counsel, and appellant is not entitled to relief simply because a chosen strategy was unsuccessful. ***Commonwealth v. Buksa***, 440 Pa. Super. 305, 318, 655 A.2d 576, 582 (1995), ***alloc, denied***, 544 Pa. 642, 664 A.2d 972. Counsel is presumed to have acted in his or her client's best interest and any suggestion to the contrary is appellant's burden to prove. ***Commonwealth v. Miller***, 541 Pa. 531, 557, 664 A.2d 1310, 1323 (1995), ***cert. denied***, 516 U.S. 1122 (1996) (citations omitted). While the cross-examination of Trooper Tasselmyer may have elicited damaging testimony, we find trial counsel acted reasonably in light of the limited options available for impeachment of the witness' identification of the appellant as the perpetrator of the crime. See ***Commonwealth v. Hill***, 542 Pa 291, 307-8, 666

---

[4] In the argument portion of appellant's brief, he fails to develop pertinent discussion of the last two issues, including citations to relevant authority. See Pa.R.A.P. 2119(a). When appellant fails to adequately develop his argument, meaningful appellate review is not possible.

a.2d 642, 650, (1995) ***cert. denied***, 517 U.S. 1235 (1996). Merely getting the wrong answer does not make counsel ineffective for asking the question. Appellant does not indicate why this decision was unreasonable, nor does he explain how he was prejudiced by it.

Appellant also maintains trial counsel was ineffective for failing to request a point of charge advising the jurors to receive the testimony of paid government informants with caution. Absent a showing of prejudice by appellant, we find this claim to be without merit. ***See Commonwealth v. Buehl***, 540 Pa. 493, 505, 658 A.2d 771, 778 (1995) (to sustain an ineffectiveness claim on the basis of trial counsel's failure to request a jury instruction, all three prongs of the ineffectiveness test must be met). The sale was made to a Trooper, not an informant, and the failure to request this instruction was inconsequential, as appellant's own curtailed analysis of the subject suggests.

Lastly, appellant contends the trial court abused its discretion by imposing an excessive sentence. As the sentence is legal, this argument challenges the discretionary aspects of his sentence. In ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 522 A.2d 17 (1987), our Supreme Court announced Pa.R.A.P. 2119(f) required parties seeking to challenge the discretionary aspects of sentence to set forth in a separate portion of their brief a concise statement of the reasons relied on for such relief. ***Id.***, at 511-12 A2d. at 19. As no such statement appears in appellant's brief, and as the Commonwealth has objected to the failure to provide a 2119(f) statement, we are precluded from reviewing this issue. ***See Commonwealth v. Huckleberry***, 429 Pa. Super. 146, 151, 631 A.2d 1329, 1331 (1993) (where Commonwealth specifically objects to

appellant's failure to include a ***Tuladziecki*** statement Superior Court is precluded from addressing merits). Even were we to reach the issue, appellant fails to show "there is a substantial question that the sentence imposed is not appropriate under this (Sentencing) Chapter." 42 Pa.C.S. Section 9781(b); ***Tuladziecki***, at 513, 522 A.2d at 20; ***see also Commonwealth v. Maneval***, 455 Pa. Super. 483, 485, 688 A.2d 1198, 1199 (1997). Both of these deficiencies preclude our review.

Judgment of sentence affirmed.

Appendix C

APENDIX C — ORDER OF THE PENNSYLVANIA SUPERIOR COURT DATED JULY 15, 1998

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 689 M.D. Allocatur Docket 1998
v..	:	
FREDERICK CHARLES DANIELS Petitioner	:	Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 24th day of November, 1998, the petition for allowance of appeal is denied.

TRUE & CORRECT COPY

ATTEST:
NOV 25 1998

"s/Shirley Bailey"
SHIRLEY BAILEY
CHIEF CLERK